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Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~301~~ 78

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 881

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

This brief is submitted pursuant to Rule 16 (3) of the Revised Rules of the Supreme Court of the United States.

Appellee's motion to dismiss is based on its contention that no substantial federal question is raised by appellants in their Jurisdictional Statement. Appellee's contention, in turn, is premised on a main argument, *viz.*: that Ordinance No. 16 is only a *regulatory* ordinance governing the operation of sand pits and, therefore, under decisons of this Court—particularly and primarily *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80—there is no substantial federal question. The majority opinion of Judge Burke adopted appellee's major premise, the opinion stating (Jurisdictional Statement, p. 2a): "Neither the injunction granted

nor the ordinance proscribes any future excavation. The injunction *merely* conditions future operations upon the issuance of a permit from the Town of Hempstead and the correction of certain violations of the ordinance". The majority opinion continues: "It is not the function of the courts, but of legislators to determine 'the reasonableness, wisdom and propriety' of the *regulations* needed to protect the community (*South Carolina Highway Department* v. *Barnwell*, 303 U. S. 177, 191) and their *regulatory* power, as the United States Supreme Court has pointed out, governs pre-existing uses (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2nd 370, cert. denied, 360 U. S. 902)." (Emphasis added.)

We agree that if this were just another case of legislation regulating methods of operating sand pits, then the ordinance would be constitutional under the holding in the *Saxl* case. However, the 1958 Ordinance No. 16 (particularly Sections 4(h) and (j), as applied to the facts of this case, permits only one conclusion, *viz.*: *all* further excavation which for 30 years has been done underwater on appellants' property is prohibited. Thus this case comes within the holding of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, not the *Saxl* case which involved the installation of an automatic wet pipe sprinkler system in a lodging house on the Bowery in New York City. Appellee does not even mention the *Mahon* case. This is a case of confiscation, not regulation of property and business of appellants.

Further, Section 4(j), *by its very terms* (and also the Judgment appealed from), requires appellants to refill the excavation, extending over 20 acres, which was legally made over a period of 30 years.

Appellee's contention that the Ordinance is "merely" regulatory is summarized as follows (Appellee's brief, p. 6): "One of the principal props of appellants' contentions

in this court is the asserted fact that the judgment below, in effect, totally and absolutely prohibits appellants' operations and leaves their land alueless (Jurisdictional Statement, p. 10). The proposition is completely without factual support." Appellee continues (p. 6) "Self-evidently, neither the ordinance nor the judgment, as Judge Burke noted (Appellants' Appendix, p. 2a) proscribes all future excavation at the site. Indeed, some 18 acres of land remain which have not yet been excavated and are still available for whatever sand they might contain".

First, as to the contention that the Ordinance does not "proscribe" all future underwater excavation, we have only to consider the language itself of Section 4(h) and (j) of the Ordinance. Secondly, the fact that appellants own 18 additional acres of property not underwater cannot possibly make legal or constitutional the taking—without payment—of the 20 acres underwater.

In exactly 17 words constituting Section 4(h), all underwater dredging and excavating (which had been adjudicated a proper use of appellants' property in the 1956 judgment (pp. 11a-14a of the Jurisdictional Statement) is specifically, unequivocally and expressly proscribed. Section 4(h) provides: "No excavation shall be made below two feet above the maximum ground water level at the site." Admittedly, and as stated on page 3 of appellee's brief: the excavation extending over 20 acres of appellant's property "is filled with water to an average depth of about 25 feet." Since 4(h), *by its very terms*, prohibits any excavation "below two feet *above* the maximum ground water level at the site", the *only* possible conclusion is that any excavations on the 20 acres of its land now underwater (average depth of 25 feet) is proscribed by and violates Section 4(h) of the Ordinance. The judgment (folio 58 of Record on Appeal) correctly states: "The pit has been

excavated substantially beyond points two feet above the maximum ground water levels at the site" and this constitutes "a violation of the said Ordinance No. 16" (folio 57).

The dissenting opinion of Judge Van Voorhis correctly concludes, after analysis of the Ordinance and facts in this case, that "the theory of 'regulation' cannot reasonably be sustained". The distinction between the *Saxl* and *Engelsher* cases of regulation, on the one hand, and prohibitory and confiscatory regulation, *Pennsylvania Coal Co.* v. *Mahon*, on the other hand, is set forth in the dissenting opinion (pp. 6a, 7a of the Jurisdictional Statement). The majority opinion which concludes that the Ordinance is "merely" *regulatory* contains no analysis of the provisions of Sections 4(h) and (j)—does not even mention these sections—and does not consider, the *Pennsylvania Coal* v. *Mahon* case.

Not only does Section 4(h), by its terms, prohibit all future excavation underwater on 20 acres of appellants' property but Section 4(j) of the Ordinance (set forth at p. 15a of the Jurisdictional Statement) requires appellants to restore the premises to its condition of 30 years ago by filling in the excavation covering these 20 acres, from which 1,000,000 cubic yards of earth have been removed (Record on Appeal, folio 237). Our extensive research of applicable decisional law reveals no case where the kind of affirmative action required by Section 4(j) has been sustained as an exercise of police power. The fact is appellee itself does not even try to answer that part of the Jurisdictional Statement in which appellants considered the requirements of Section 4(j) of the Ordinance.

Pursuing its main point: that Ordinance No. 16 does not prohibit but "merely" regulates appellants' underwater dredging, appellee argues (p. 11) that there may be other profitable uses of appellants' property on which an arti-

ficial lake[1] exists. (Inherent in this argument is the assumption that other profitable uses of defendants' property underwater exist—although Section 4(j) requires that the lake be refilled.) Appellee cannot suggest a single profitable use, other than dredging,—for the simple reason: there is no other profitable use. The suggestion made in one of appellee's briefs (in the Appellate Division) that the lake could be used for boating or swimming, was discarded when appellants pointed out (1) that Section 4(j) requires the lake be filled in and (2) appellee's suggestion is contrary to the assumed (but false) major premise that the water on appellants' property is dangerous, *per se*.

Striving again to get away from the unambiguous provisions of Sections 4(h) and (j) which confiscate defendants' property rights by completely and forever eliminating underwater dredging, appellee argues (p. 7) that there is or may be no more sand and gravel to be excavated under appellants' 38 acre tract. This argument is contrary to the undisputed testimony (folios 327-329) that there are available deposits to be removed. Even appellee's own statement (p. 3) that the excavation underwater had a depth of 48 feet in various places, with an average of 25 feet, shows that there is at least 23 feet of earth to be removed over the 20 acres now under water (see appellee's exhibit 3). Appellants were excavating and selling sand and gravel right up until the entry of judgment in this case.

Although the basic premise of the majority opinion of the New York Court of Appeals is that Ordinance No. 16

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[1] Appellee's ominous description of the excavation as a "huge crater" and its statement (contrary to proof) that the water is "stagnant" were adopted as facts in the opinion written by the Trial Court. Actually the lake is fed by natural springs and the dredging operations themselves cause a continuous circulation of water.

is only a "regulatory" ordinance, nevertheless appellee argues that even if the ordinance is considered confiscatory and prohibitory and "though its effect is to deprive the individual's property of its only profitable use" (Appellee's brief, p. 11), the ordinance would still not be a taking of property without due process of law. In support of this argument, appellee cites (p. 11) *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadechek* v. *Sebastian*, 239 U. S. 394, and *Pierce Oil* v. *City of Hope*, 248 U. S. 498. These cases (described as "extreme cases" by Mr. Justice Douglas in the *Saxl* case, 328 U. S. 80, 83) involved activities which were found to be, on demurrer, noxious, offensive and "productive of disease" (Mr. Justice Pitney in *Reinman* v. *Little Rock*, 237 U. S. at p. 178).

In the instant case, there is absolutely no proof whatsoever that the appellants' operations were noxious, offensive, dangerous, a nuisance, or productive of disease. In place of such evidence, the Trial Court and the majority opinion in the Court of Appeals substituted "common knowledge". In place of proof—and contrary to the proof and contrary to the concession of "no nuisance" which appellees' counsel made on the oral argument in the Court of Appeals—the Trial Court adopted the recital of Ordinance No. 16 as its sole basis for its holding. Having overcome the presumption of constitutionality involved in these recitals (see p. 8, *infra*) the case at bar stands on all fours with the situation in the *Mahon* case where this Court reversed the decision of the high Court of Pennsylvania which had likewise sustained the constitutionality of the Statute prohibiting coal mining under houses, on the basis of the recitals of the Pennsylvania Statute and the presumption of constitutionality (*infra*, p. 12).

Furthermore, in the *Reinman*, *Hadechek* and *Pierce Oil* cases, this Court pointed out that the noxious business could move elsewhere; and in the *Hadechek* case it was

specifically pointed out that the Court was not prohibiting the taking of the clay out of the ground, but only the making of the brick from the clay (see Jurisdictional Statement, pp. 14, 15).

The *Reinman*, *Hadechek* and *Pierce Oil* cases were decided on motion or demurrer. In the *Reinman* case, the plaintiff demurred to the answer of the City of Little Rock which, in the words of Mr. Justice Pitney, had alleged that plaintiff's "stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease." Mr. Justice Pitney pointed out (p. 178):

> "Plaintiffs did not contradict this but demurred to the answer as insufficient in law and the case was heard in the trial court upon * * * the demurrer."

Likewise, the *Pierce Oil* case was decided on a demurrer and on the pleadings which alleged that the storage of gasoline 300 feet away from any dwelling was dangerous. Neither the *Reinman* nor the *Hadechek* nor the *Pierce Oil* cases are cited in Mr. Justice Holmes' opinion in *Pennsylvania Coal Co.* v. *Mahon*. The fact that Mr. Justice Holmes also wrote the opinion in the *Pierce Oil* case is significant.

Furthermore, in none of those cases was there any affirmative requirement that the owner of the business not only desist from carrying on the noxious business, but go further and make an expenditure of approximately $1,000,000 (required in our case) to restore the premises to their original condition. Moreover, in none of these "extreme cases" had there been a previous adjudication, such as we have here, that the business involved was a legitimate and proper business, nor was there a judicial finding such as was made in the 1956 litigation (Jurisdictional Statement, p. 11a) in our case that appellants were "entitled * * * to continue their operations, *in futuro*, as to the entire premises". (See Jurisdictional Statement, pp. 20, 21.)

The majority opinion of the New York Court of Appeals sustains the constitutionality of the Ordinance on the general principle of presumption of constitutionality involved in the mere passage of legislation. However, as we have shown in our Jurisdictional Statement (pp. 11-13) this presumption was overcome (1) by the undisputed fact and showing that appellants' vested rights of a prior nonconforming use of their property (constituting their excavating business, continually operated since 1927 and judicially declared valid), have been eliminated and confiscated; and (2) any presumption of constitutionality involved in the mere recital of the ordinance (viz.: "to remove the danger to health and life caused by deep excavations remaining in the ground") was overcome by the proof that there was not a single instance of danger or damage to surrounding property, there was not a single case of any injury to a single person—adult or child—caused by appellants' 30 years of operations, and that there was not even a single instance of trespassers on appellants' property, completely surrounded by 7,000 lineal feet of wire fence. Appellee appears aware of the fact that the presumption of constitutionality was overcome and therefore (1) appellee asks this Court to take judicial notice of a death which allegedly happened (no facts given) on appellants' premises in 1944, before any Town ordinance required fencing, and (2) appellee now challenges (brief, p. 18) its own concession made on the oral argument in the Court of Appeals, that appellants' operations did not constitute a nuisance. This concession was noted in the dissenting opinion (Jurisdictional Statement, p. 8a) in which three judges joined.

As to the alleged death (which Appellee raised for the first time in its brief in the Court of Appeals), Mr. Justice Van Voorhis (Appellants' Appendix, p. 10a) noted: this

alleged death "is not shown by the record". According to appellee's own version (in its brief in the Court of Appeals) there was a police report in 1944 of a death, which gave no factual basis and ascribed no fault to appellants. As also noted by Judge Van Voorhis, whatever the situation be with respect to this 1944 case, it happened prior to the enactment by the Town-appellee of any ordinance requiring a fence. It was not until 1945 that the Town ordinance required such fence, and admittedly appellants have built a wire fence in full compliance with that ordinance, surrounding the entire premises of appellants (7,000 lineal feet), 6 feet high, topped by three strands of barbed wire. Since that time appellee cannot show—even outside the record—a single instance of an accident or injury to person or property.

Furthermore, this one incident, *dehors* the record, would not prove danger or nuisance sufficient to sustain Ordinance 16 which eliminates appellants' non-conforming prior use of excavation without compensation. And it would be appellee's burden to prove such nuisance. Certainly appellants had no duty to prove their operations constituted a nuisance. See opinion of Conway, *C. J.* in *Town of Somers* v. *Carmarco*, 308 N. Y. 537, at p. 541 where it is stated that in order to sustain legislation confiscating vested rights of a non-conforming prior use under the "town's police powers" it is necessary for the town to prove that the ordinance is "to prevent the creation or maintenance of a nuisance on the premises of the defendants." In our case appellee made no attempt to prove such nuisance which, as we said, explains its current attempt to bring in a "reported", isolated 1944 happening *via* the doctrine of judicial notice.

The statement in appellee's brief (p. 10) which was adopted in the opinion written by the trial court, of

drownings in *other* sand pits is again matter *dehors* the record and is totally irrelevant and immaterial in our case since our case involves no proof of a single accident—let alone death—and ours is *not* an "unregulated" pit such as appellee discusses in its brief (p. 10). In any event these "other cases" do not supply or constitute proof of nuisance or danger in appellant's operations.

Throughout appellee's brief, as well as throughout the opinion of the Trial Court, there is the unfounded assumption that there is danger *per se* or nuisance *per se* in the existence of a body of water or in dredging operations under a body of water. The law is to the contrary. See *infra*, p. 11.

Likewise, in the opinion of the Trial Court, there is the unfounded assumption—contrary to the proof (Record on Appeal, folios 464, 469)—that appellants' operations are dangerous to neighboring land. Similarly, in the majority opinion of Judge Burke, reference is made to "common knowledge" that "the uncontrolled operation" of sand pits presents a hazard. Appellants' operations were *not* "an uncontrolled operation" and appellants do not claim that they are not subject to control or regulation. Until Ordinance No. 16 was amended in 1958 to include Sections 4(h) and 4(j), the Ordinance was regulatory and appellants complied with all regulations. Appellants cannot comply with Sections 4(h) and (j) of the 1958 ordinance which *prohibits* further excavation under water. The only way to *comply* is to desist—and fill the excavation, covering 20 acres.

As to appellee's denial that it made a concession that appellants' activities do not constitute a nuisance—since the concession is not part of the Record, but was noted by the three dissenting Judges (p. *8a* of Jurisdictional

Statement), we leave the conclusion about the making of that concession to this Court. Whether or not the concession was made, the fact remains there is *no proof* of any nuisance in appellants' excavating activities which the Ordinance now proscribes. The evidence is to the contrary. Therein does this case differ from the "extreme cases" noted *supra*, p. 6.

There is an essential fallacy in the underlying assumption that a body of water is inherently dangerous. The assumption pervades the majority opinion of the Court of Appeals, which recites the fact that appellants' sand pit exists in the midst of a residential area.[1] In numerous New York cases it has been held that a body of water is *not* "inherently dangerous" or a "nuisance". See *Pope* v. *State*, 198 Misc. 31, 36, aff'd 277 App. Div. 1157; and *Cunningham* v. *City of Niagara Falls*, 232 App. Div. 49, 42, aff'd 269 N. Y. 644. In both cases, an unfenced and unguarded body of water was held *not* to be "classified as inherently dangerous or a nuisance" (198 Misc. at p. 36).

In answer to the observation made in the majority opinion, that there are 2,200 homes and 4 schools in the neighborhood of appellants' premises (which are completely surrounded by a 7,000 lineal foot wire fence) we might note that there exists in Central Park in New York City a body of water, unfenced, and surrounded by thousands of homes, hundreds of schools and millions of children. Moreover, and again concerning appellee's reference to a death supposedly on appellants' premises (no facts given)—if that "fact" be subject to judicial notice, then judicial notice should be

[1] The objection to appellants' activities in this neighborhood was adjudicated against appellee in the 1956 litigation (Jurisdictional Statement, pp. 11a-14a). As noted by Judge Van Voorhis: "Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants' operations and the artificially created lake were evident and obvious."

taken of the fact that there were reportedly 3 drownings in Central Park in 1960. Judge Van Voorhis noted:

> "There are some hazards in the operation of any legitimate business. Automobiles are not kept off highways for the reason that children as well as adults are occasionally injured or killed by them."[3]

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, this Court reversed the Supreme Court of the State of Pennsylvania (274 Pa. 489, 497), where the constitutionality of the Kohler Act, prohibiting coal mining under dwellings and public places had been upheld as a valid exercise of the police power. The Pennsylvania Court had relied upon the finding of the Pennsylvania legislature and the Governor who signed the bill that the legislation was enacted because "lives have been lost, homes, churches and schools destroyed, and an ever present peril has threatened the morale of the entire community" (*Mahon* v. *Pennsylvania Coal Co.*, 274 Pa. 489, 497). The Pennsylvania Court went on further to say that the mining which was prohibited by the Kohler Act had been declared by the Legislature "to be a public nuisance". The opinion of Mr. Justice Holmes in the *Mahon* case (as well as the dissent of Mr. Justice Kephart in the Pennsylvania Court (274 Pa. at 512)) challenged the recital that the Act was passed to "prevent the terrible menace to human life, public safety and morals".

Likewise, in our case, the mere recital in the Town's ordinance of danger in pits generally was overcome by the proof in this case that there was no danger in fact (no injury to person or property, and no threat of such injury or danger); and there is no danger *per se* in appellants'

[3] We doubt that appellee would contend that legislation prohibiting automobiles would be constitutional, cf. *Trio Distr. Corp.* v. *City of Albany*, 2 N. Y. 2d 690, 696.

operations or in the existence of a body of water, completely surrounded by wire fence maintained in good condition.[4]

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393, was considered in both the majority and the minority opinions of this Court in *United States* v. *Central Eurica Mining Co.*, 357 U. S. 155, 168, where the majority held that a W. P. A. order closing gold mines during the war was only a temporary restriction on the operation of the gold mines and was, therefore, not a "taking of property". However, Mr. Justice Burton, after citing the *Mahon* case, said (p. 168):

> " • • • we have recognized that action in the form of a regulation can so diminish the value of property as to constitute a taking, e.g., United States v. Kansas City Ins., 339 U. S. 799; United States v. Cansby, 328 U. S. 256."

The majority opinion written by Mr. Justice Harlan, citing the *Mahon* case, would pay compensation (under the Fifth Amendment) for the taking by the United States of the gold mines, although only temporarily restricted. The dissenting opinion cites the statement of Mr. Justice Holmes in the *Mahon* case:

> " • • • if regulation goes too far, it will be recognized as a taking."

This Court has often stated that the taking of property by the United States government under the Fifth Amendment is governed by the same principles as a taking by State legislation under the Fourteenth Amendment.

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[4] The observation by the Trial Court of holes "under the fence, evidently dug by children" finds absolutely no support in the Record on Appeal.

Concededly the appellee-town, in enacting the 1958 ordinance wanted to get rid of appellants' operations and particularly the body of water existing on 20 acres of appellants' land. The opinion written by the Trial Court evidences the same *desideratum*. However, as stated by Mr. Justice Holmes in the *Mahon* case (260 U. S. at p. 416): " * * * a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change". The "constitutional way" is, of course, by the "exercise of eminent domain and compensation to sustain the act" (260 U. S. at p. 413).

The appellee does not deny (1) the fact, as noted in our Jurisdictional Statement, that the appellee-town actually had prepared a drainage map (Exhibit C in evidence) which contemplated the use and taking of appellants' property in condemnation and (2) the fact that representatives of the appellee had talks with appellants concerning condemnation. Instead of carrying through with such constitutional method of taking appellants' property, appellee chose the enactment of Ordinance No. 16 which accomplishes the same purpose, *without* compensation to appellants. Ordinance No. 16 is in reality what this Court in *Loan Association* v. *Topeka*, 20 Wall. 655, 664 characterized as "not legislation" but "robbery * * * under the forms of law." Mr. Justice Holmes noted (260 U. S. at p. 415) the "natural tendency of human nature is to extend" the doctrine of "police power * * * more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States".

Finally, we come to appellee's argument, adopted in the majority opinion of Judge Burke, to wit: that the Ordi-

nance is not unconstitutional, even so far as it prohibits further operations on the 20 acres (where the water exists and requires a refilling of that entire acreage) because appellants own 38 acres and the 18 acres not under water are, in the words of Judge Burke, "available for excavation". We think the statement of the argument is sufficient refutation of the argument.

This is no ordinary case of zoning or a regulating a business or this business of appellants. In our Jurisdictional Statement and in this brief we have considered only Sections 4(h) and (j) of the 1958 Ordinance. Other requirements, such as the placing of a concrete curb beneath the 7,000 feet of fence which had been built according to the 1945 Ordinance go beyond reasonable regulation. "No object in the installation of this concrete curbing has been shown except that it would put [appellants] to the expense of removing the fence, laying the concrete and constructing a new fence. This along with [other provisions of the 1958 Ordinance] * * * shows that the purpose was expropriation rather than regulation" (Van Voorhis, *J.*, at p. 8a of Jurisdictional Statement). If we are permitted a plenary hearing in this Court, we would demonstrate at length how other provisions of the 1958 Ordinance e.g. degree or grade of slope, constitute unconstitutional requirements (see p. 8a of Jurisdictional Statement).

This is a case where there has been an "arbitrary and discriminatory exercise of the police power", *Dobbins* v. *Los Angeles,* 195 U. S. 223, 241.

On the issue of whether the penal provisions of Ordinance No. 16 violates the constitutional provision prohibiting *ex post facto* legislation, see, in addition to the cases cited in our Jurisdictional Statement, *Trop* v. *Dulles,* 356 U. S. 86.

On the issue of whether the 1958 enactment of Ordinance No. 16 violates the due process clause in overruling rights acquired by the 1956 judgment (see Jurisdictional Statement, pp. 20, 21), the appellee argues (p. 12) that the 1958 ordinance was not in existence when the 1956 case was tried and therefore the 1956 judgment is not *res judicata*. Of course, the 1958 ordinance was not adjudicated in the 1956 lawsuit. It was enacted to overcome and overrule—and it does overrule—the rights acquired by appellants under the 1956 judgment. That is precisely why the Ordinance is violative of the due process clause, taking away rights acquired in the 1956 judgment. Appellee fails to answer this point (see Jurisdictional Statement, pp. 20, 21).

In the *Saxl* case (328 U. S. at p. 82) Mr. Justice Douglas noted: "The case is here on appeal, the Court of Appeals [of New York] having certified * * * that questions involving the Fourteenth Amendment were presented and necessarily passed upon". Beyond any doubt our case presents only such constitutional questions. Both the majority and minority opinions of the New York Court of Appeals *expressly* so state.

CONCLUSION

The motion to dismiss should be denied. There are very substantial federal questions involved. The judgment below should be reversed; or in the alternative, a plenary hearing of the constitutional issues should be permitted.

Respectfully submitted,

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